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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 434

JOSEPH P. BRYANT, JR.,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

LEON A. RANSOM,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 434

JOSEPH P. BRYANT, JR.,

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vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review a judgment and order of the United States Court of Claims denying the claim of petitioner filed under the provisions of Section 145 of the Act of Congress of March 3, 1911, being Section 145 of Chapter 331, 36 Stat. 1136 (U. S. C., Title 28, Section 250(1)), entered by the said Court of Claims on June 3, 1952.

A

Jurisdiction

The jurisdiction of this Court is invoked under the provision of The Act of Congress of February 13, 1925, being Section 3, Chapter 229, 43 Stat. 939; May 22, 1939, Ch. 140,

53 Stat. 752 (U. S. C., Title 28, Section 288(b)), this being a claim against the United States authorized to be prosecuted under the provisions of Section 145 of Chapter 231 of the Act of Congress of March 3, 1911, 36 Stat. 1136 (Section 250(1), Title 28, U. S. C.).

The judgment sought to be reviewed herein was entered by the United States Court of Claims on June 3, 1952. The judgment and order of the Court of Claims is not yet officially reported. The opinion of the Court below appears at p. 13 of the Record, and the judgment at page 16 thereof.

On September 2, 1952, this Court, for good cause shown, entered an order extending the time within which to file a petition for a writ of certiorari to October 2, 1952. On said latter date, good cause again being shown, this Court further extended the time for filing said petition to November 1, 1952. This petition is presently filed in accordance with the order of this Court dated October 2, 1952.

B

Summary Statement of the Matter Involved

I

Brief Statement of the Case

This is an action for the collection of damages for the unpaid salary and expenses incident thereto, and for the collection of damages for the deprivation of right and opportunity to be advanced in the Postal Service of the United States Government to a position of trust as an employee of the United States Government under the rules, regulations and laws of the respondent governing the administration of the Civil Service and Postal Service departments of the respondent. Petitioner claims that he was improperly separated from his employment in the

postal service of the respondent on October 15, 1946, contrary to the provisions of Tit. 5 U. S. C., Sec. 652, and that such improper separation continued until January 3, 1948, and that, when he was reinstated in such service, on this latter date, the reinstatement was made with improper and illegal restrictive conditions and limitations as to his future employment and service.

Petitioner says that he was dismissed from respondent's employ because of arbitrary, wilfull and malicious acts of agents of the respondent and that such dismissal occurred prematurely (*i. e.*, before he had been given opportunity to establish his innocence of the acts of which he had been accused), and that such dismissal, in itself, was premature, arbitrary, and contrary to the rules, regulations and laws applicable to his employment and tenure in his position as an employee of the respondent.

II

Salient Facts

Petitioner, a native born citizen of the United States, now a resident of the City of Los Angeles, California, where he is employed by respondent as a postal employee, but who, at the times material herein, was residing in the City of Cleveland, Ohio, entered the postal service of the United States Government in 1927 at Cleveland, Ohio as a career employee under the rules and regulations of the United States Civil Service Commission and the Postal Service Laws (R. 2, 6). On October 15, 1946, the critical date here involved, he was employed at the Shaker Square Station, a postal substation in Cleveland, Ohio, as a "window-clerk" (parcels post division), a position of trust involving the handling of money between patrons of the post-office and the United States Government (R. 2, 6). At this time petitioner's annual salary was fixed at a minimum of $3100.00, and he,

being entitled under the laws of the United States to an annual promotion and increment in salary by reason of longevity in the service (R. 2), would, if he had remained uninterruptedly in such service from October 16, 1946 to January 3, 1948 (and having received his automatic promotion and salary increase on July 1, 1947), been entitled to a gross salary of $3692.22 (R. 8) for which this claim, as adjusted, is prosecuted (R. 5, 8). He admits that his earnings during this same period from *all* other sources amounted to $2,181.37 (R. 8), but says that only $2060.60 of this amount is deductible from his claim in diminution of damages, the balance being income which would have accrued to him regardless of the acts of respondent herein complained of.

Petitioner charges that on or about September 1, 1946 certain employees, agents and servants of the respondent, being, namely, Julius Szkell, James Vilics, James Urban, and divers other persons to him unknown, all being employees of the postal service in Cleveland, Ohio, entered into a conspiracy with each other to wrongfully accuse petitioner of a federal criminal offense, *i. e.*, the wilful and malicious making, and accepting for his own profit, of overcharges from post-office patrons for parcel post shipments (R. 2). That such a conspiracy existed appears from the testimony of A. J. Urban, James Vilics, Julius Szkell, Lillian McCrystal, David A. Hopkins and Beatrice Breen, all of which testimony was taken at the trial of *United States of America* v. *Joseph Bryant, Jr.*, in Criminal Case Number 19072 in the United States District Court for the Northern District of Ohio on April 14 and 15, 1947, and a transcript of which was offered in evidence herein and rejected by the Court below (T. 32; R. 8). There is further proof, however, of the alleged conspiracy in defendant's (here the respondent) Exhibits 2 and 3 (erroneously cited in Plain-

tiff's Exceptions to the Report of the Commissioner as "Exhibits 3 and 4") (R. 9), which were admitted, with reservations and exceptions by the petitioner, into the evidence herein (Tr. 27). Ultimate proof of the conspiracy on the part of the government employees is afforded by the admission of the government in the criminal trial above referred to, at p. 103 of the transcript of said trial, that there had been an earlier attempt to entrap petitioner on this accusation, which effort, on October 3, 1946, had proved the charge unfounded.

Leaving aside the question of the existence of a conspiracy, the following facts are uncontroverted. On October 15, 1946 the respondent, acting through its agents (post-office inspectors), and on information previously furnished by the alleged conspirators (Tr. 26) sent two of its women employees to petitioner's window in an effort to obtain evidence of mishandling of funds. These two persons, whose testimony is completely uncorroborated as is shown by p. 41 *et seq.* of the excluded transcript of the criminal proceedings, claimed that petitioner overcharged them for postage on parcels they submitted in the amount of twenty-eight and forty-four cents, respectively (R. 6, 7). *Mirabile dictu*, these two alleged fraudulent acts occurred in immediate succession. There is no evidence of any intervening patron at petitioner's window between the transactions. Yet, out of hundreds of daily transactions, and despite the fact that previous "tests" had failed to disclose any irregularity in his operations, the petitioner was supposed to have been guilty of two successive overcharges to two of respondent's employees for a total of seventy-two cents.

Immediately thereafter, on that same date of October 15, 1946, the petitioner was immediately apprehended by the aforesaid postal inspectors, who, acting as the agents

of the respondent, removed him from his assigned place of duty, escorted him to the central post-office, searched him and there verbally charged him with making a false and fraudulent overcharge. Petitioner, under oath, and in writing, denied the charge (Pl. Ex. 2; Tr. 4). It may be appropriate here to note that at the time of petitioner's apprehension by the inspectors there was no inaccuracy found in his cash drawer, no unaccounted for money on his person and the packages received from the informers bore the correct amount of postage (Criminal Transcript, 41 ff.). Likewise the government admits that the currency given to the informers with which to pay for the postage and from which the alleged change was received, was not identified as among the money found in petitioner's cash drawer.

Petitioner was immediately, on October 15, 1946, suspended from his position as a postal employee by the Postmaster General of the United States, acting through his subordinate officials in Cleveland, Ohio (R. 6). Two days later, on October 17, 1946, formal written charges accusing him of making the fraudulent overcharges, were filed against him in the post-office department (Pl. Ex. 1; R. 6, 7), in compliance with the provisions of Title 5, Section 652, U. S. C. In accordance with the procedures provided by that statute, petitioner filed his written denial, under oath, of the said charges within five days thereafter, to-wit on October 22, 1946 (Def. Ex. 1; R. 7).

On the same day that the charges above referred to were filed against petitioner under the rules and regulations of the Civil Service and Post Office Departments of the respondent he was arrested by the Government of the United States in Criminal Case No. 19072 in the District Court of the United States for the Northern District of Ohio, Eastern Division on a warrant charging him, in two counts, for violation of Paragraph 330 of Title 18, U. S. C., the war-

rant being based on the same facts heretofore related. Bond was furnished in the amount of $1000.00 and a hearing fixed for October 25, 1946, on which day a hearing was had, the bond continued, and, on *November 20, 1946,* an information was filed against the petitioner which, in two counts, charged him with the alleged offenses committed on October 15, 1946. Petitioner was put to trial upon this information on April 14 and 15, 1947 and was promptly *acquitted.* (R. 7). The refusal of the Court of Claims to receive the transcript of the testimony of these proceedings, for the purposes hereinafter set forth, is one of the bases of error relied upon by petitioner.

On November 12, 1946, *eight days before* petitioner had been informed against on the criminal charges of which he was subsequently acquitted, and only *twenty days after* he had made his denial of the Civil Service charges preferred against him, and *without any investigation or hearing,* but *upon* prejudicial and biased recommendations made October 19, 1946 and October 28, 1946 respectively (Def. Ex. 2, 3) the First Assistant Postmaster General of the United States advised the postmaster at Cleveland, Ohio, that petitioner was to be permanently separated from the service of the respondent. (Pl. Ex. 3, 4). Pursuant to this advice, petitioner was formally severed from the postal service of the respondent as an employee as of November 15, 1946, although he had been under suspension therefrom since October 15, 1946 (Pl. Ex. 3, 4; R. 6, 7).

Immediately after his trial and acquittal on the criminal charges petitioner addressed a letter to the postmaster at Cleveland, Ohio, relating the results of said trial and asking for reinstatement to his former employment (Pl. Ex. 5; R. 7). After a reply from the latter (Pl. Ex. 6), petitioner, on May 5, 1947 addressed a similar letter to the First Assistant Postmaster General of the United States,

making the same request (Pl. Ex. 7; R. 8). On May 19, 1947, this official, the responsible agent of the respondent, replied denying the request and stating "In view of the nature of the charges which resulted in your separation from the service, it is deemed inadvisable to take any action looking to your reinstatement to a position in the postal service." (Pl. Ex. 8; R. 8).

After some intervening correspondence with various Congressional representatives, e.g., Pl. Ex. 9, the First Assistant Postmaster General, on September 26, 1947 wrote the postmaster at Cleveland as follows:

> "After further consideration of the case of Joseph P. Bryant, Jr., formerly employed as a clerk in your office, *it is felt that he has been sufficiently punished* * * *. The completed forms when received will be transmited to the Civil Service Commission with a view to Mr. Bryant's reinstatement. If and when a reinstatement is authorized, *in view of the record of Mr. Bryant as a window clerk and of the numerous shortages in his fixed credit, he is not to be given an assignment where he will handle financial transactions at any time.*" (Italics supplied). (Pl. Ex. 10; R. 8).

On January 3, 1948 petitioner was formally reinstated in the postal service of the respondent (R. 3, 4, 8), and, subsequently, of his own volition requested a transfer from the Cleveland postoffice to that in Los Angeles, California where he is presently employed.

C.

Questions Presented

I

Whether the summary dismissal of a Civil Service employee of the Post Office Department of the United States based upon a mere accusation of the commission of an

offense against postal rules and regulations, where a criminal prosecution of the employee based upon the same charges results in an acquittal on the merits, is an arbitrary abuse of the governmental power to dismiss an employee for the efficiency of the service.

II

Whether the dismissal of such employee from the Civil Service of the government, upon the mere preferment of the charges in writing, and the receipt of the written answer thereto, *without any subsequent investigation* of the facts, constitutes a *real*, instead of a pretended, compliance with the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 539, 555; U. S. C., Tit. 5, Sec. 652) governing dismissal of civil service employees.

III

Whether the Court of Claims committed error in refusing to admit in evidence, on behalf of the petitioner, the transcript of the testimony taken in his criminal prosecution for the identical alleged offenses which resulted in the dismissal here complained of.

D.

Reasons Relied Upon for Allowance of the Writ

1. Petitioner concedes the power of the respondent, within a limited exercise of reasonable discretion to dismiss civil service employees for "such cause as will promote the efficiency of said service" (Section 6 of the Act of August 24, 1912 (37 Stat. 539, 555; U. S. C. Tit. 5, Sec. 652), *infra*, p. 10. However this power, like all other discretionary powers is subject to the rule that it may not be used arbitrarily, capriciously, or in bad faith.

Gadsden v. *United States*, 111 Ct. Cl. 487.

This Court has repeatedly exercised its authority to prevent an abuse or an erroneous misuse of the power of dismissal by administrative agencies of the government.

Burchell v. *Marsh*, 17 How. 344, 349;
Kuhlberg v. *United States*, 97 U. S. 398;
U. S. v. *Gleason*, 175 U. S. 588, 602;
Ripley v. *U. S.*, 223 U. S. 695, 701.

In the instant case a cursory review of the testimony, even excluding that portion here claimed to have been erroneously denied admission before the Court of Claims, establishes that the charges upon which petitioner was dismissed were procured by malice and prejudice, and that the recommendations upon which the respondent acted in the dismissal were predicated upon the same motives and were a part of the original conspiracy. Under such circumstances there can be no justifiable claim of good faith.

2. While the provisions of the Civil Service Act relating to the separation of employees from government service are somewhat elastic as to the procedure required, it is submitted that they contemplate some kind of deliberative action rather than a mere compliance with form. The statute relied upon, Section 6 of the Act of August 24, 1912 (37 Stat. 539, 555; U. S. C. Tit. 5, Sec. 652) reads in part as follows:

> "That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required

except in the discretion of the officer making the removal; * * *".

Petitioner admits that he was furnished with a written copy of the charges and afforded an opportunity to answer the same. But here all similarity to an investigation ceased. In the instant case the recommendation for and the decision to effect the removal were arrived at before petitioner's allotted time for answer to the charges had expired in fact they occurred exactly two days after the charges were filed (Def. Ex. 2 and 3). And the respondent admits that the only justification for the dismissal is this recommendation (Tr. 26). This case is even more flagrant than that of *Elchibaoff* v. *The United States*, 106 Ct. Cls. 541, in which this type of hasty procedure was severely criticized.

3. The sole question presented by the petition below was whether or not the respondent was justified in the dismissal of the petitioner, or whether its action was arbitrary. The Court of Claims could not thoroughly pass upon this question without an examination into the motives which led to the preferment of the charges and the recommendations of removal. Those motives are not available or ascertainable from the face of the only documents admitted into evidence in this cause. To determine these motives resort must be had to the testimony given under oath of those responsible for the accusation and consequent action. That testimony was and still is available to the Court in the form of a certified transcript thereof. That testimony, if it had been read by the Court of Claims, would have disclosed the malicious purpose and the preconceived design which resulted in the damage complained of. It is submitted that it is reversible error for a court to deliberately exclude competent evidence where such evidence is probative of the gist of the claimant's right of action.

E.

Conclusion

WHEREFORE, for the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the United States Court of Claims be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 434

JOSEPH P. BRYANT, JR.,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Opinion of the Court Below

The opinion of the United States Court of Claims is not yet officially reported. It appears (including the Special Findings of Fact, Conclusion of Law, Opinion, and Judgment) in the Record at pp. 10-16, inclusive.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of the Act of Congress of February 13, 1925, as amended (Sec. 3., Ch. 229, 43 Stat. 939; Act of May 22, 1939; Ch. 140, 53 Stat. 752; U. S. C. Tit. 28, Sec. 288 (b)).

The judgment sought to be reviewed was entered by the United States Court of Claims on June 3, 1952. By mesne

orders of Justices of the Supreme Court of the United States the time for filing the present application for certiorari was extended to November 1, 1952.

Statement of the Case

The statement of the case and the nature of the application for the writ of certiorari are believed to have been set forth with sufficient particularity in the accompanying petition for the issuance of the writ.

Brief Theory of the Case

While it is confidently believed that all of the pertinent facts have been fully and satisfactorily set forth in the accompanying Petition, and this recital statement may, therefore, be repetitious, it may not be amiss to again summarize them (leaving out all superfluous references to the Record) in order to clarify the arguments hereinafter to be made.

This being a claim against the United States Government for the recovery of alleged damages authorized by the terms of the "Court of Claims Act," it obviously sounds in contract. Simply stated, in the terms of the common law, it would be an action for damages arising out of a breach of contract of employment, whereby petitioner claims that having been employed for a definite period, fixed by the Civil Service statutes which delimit such period of hiring, the employer, i.e., the United States Government, respondent herein, has wilfully and wrongfully terminated that contract. The employer denies responsibility on the ground that the termination, though prior to the expiration of the contemplated term, was made in accordance with and according to conditions either expressed or implied (statutorily) in the contract of hire. Basically stated, the present controversy is determinable by the answers to two funda-

mental questions—one of law and one of fact. These are, respectively (a) under existing law may a classified Civil Service employee of the respondent be peremptorily deprived of his presumably lifetime contract of hire by a unilateral determination of an administrative departmental agent of the employer that such severance is for the "promotion of the efficiency of the service" without judicial investigation of the basis of such determination?, and (b), assuming that the answer to the foregoing question is in the negative, is that judicial investigation concluded by the prior administrative ruling or finding as to the limits within which discretionary power should be exercised?

Petitioner says that having been employed as a classified Civil Service employee of the respondent in 1927, his contract of employment could only be terminated "for cause" upon a *bona fide* showing that it was to "promote the efficiency of the service."

He alleges, in his petition below, that his separation from his employment was neither so accomplished nor prompted. He alleged, and offered to prove, that his dismissal was motivated by racial antagonism, personal prejudices of fellow employees and their private ambitions. In support thereof he tendered proof of immediately prior accusations, similar to those upon which he was ultimately discharged, made against him and which, upon investigation, were found to be false; conversations among his subsequent accusers indicating a desire and a conspiracy to cause his dismissal; a departmental "by passing" of his immediate supervisors in order to make the accusations and cause the investigations to be made to and heard by persons who were not only sympathetic with the original conspirators but were a party to such conspiracy; and, finally, premature recommendations for a finding of guilt and removal from office by these same alleged parties to the conspiracy (all of

whom are responsible agents of the respondent), upon which recommendations of the conspirators the respondent finally acted without investigation as to the facts involved, to the detriment of the petitioner; for all of which he claims the respondent is liable in damages. As final proof of the fact or contention that he was arbitrarily and maliciously dismissed, there is the uncontroverted fact that he was acquitted, *upon the merits,* in a federal criminal prosecution for the commission of the very acts for which he had been discharged in the instant case. A federal criminal jury, hearing *all* the testimony, including that of his informers, unhesitatingly acquitted him of the commission of the very acts which these same informers, claimed by petitioner to be conspirators against him, relied upon, on information only, to be sufficient to justify their recommendation for dismissal of petitioner. And this recommendation was made only *two days after* the acts were *said* to have been committed, and *three days before* petitioner had an opportunity to answer.

After his acquittal in the criminal proceedings, petitioner rightfully sought restoration to his contractual rights of employment with respondent. These having been denied for approximately fifteen (15) months after his illegal dismissal from respondent's service, and then restored only with derogatory insinuations and ignominious conditions, he sought the only remedy provided by law—compensation for the monetary loss suffered.

At no time nor place has the respondent sought to justify its action other than by the calloused statement that its action was "discretionary." The United States Court of Claims, by its findings, conclusions and judgment below, apparently closing its eyes to the self-evident facts available to it, has, in turn, supported the position of respondent and ruled that a federal civil service employee is without remedy

for a summary dismissal from his employment unless he can establish a violation of the literal terms as to procedure in the Civil Service Act. This decision ignores the purpose of the act and leaves the rights and fate of petitioner, along with the hundreds of thousands of his fellow employees at the whim and caprice of administrative agency heads, unless this Court so construe the applicable laws as to place some judicial limitation, clearly defined, upon the admitted discretionary power of administrative agencies so as to prevent arbitrary abuse.

Argument

I.

THE SUMMARY DISMISSAL OF AN EMPLOYEE FROM THE CIVIL SERVICE FOR ALLEGED INFRACTION OF DEPARTMENTAL REGULATIONS, WHERE THE EVIDENCE IN A SUBSEQUENT CRIMINAL TRIAL ON IDENTICAL CHARGES, RESULTING IN AN ACQUITTAL, SHOWS THAT THE DISMISSAL WAS THE RESULT OF A MALICIOUS CONSPIRACY OF RESPONDENT'S AGENTS FOR THAT VERY PURPOSE, IS AN ARBITRARY ABUSE OF THE POWER TO DISMISS.

While there is no "property right" to employment under the civil service of the United States Government, yet there is such a "right" therein as is capable of protection by statute against arbitrary or malicious infringement. Neither the employment itself nor the salary attached thereto may be taken away except in the manner provided by the Congress. *Beurhring* vs. *United States*, 45 Ct. Cl. 404. Section 6 of the Act of August 24, 1912 (U. S. C., Tit. 5, Sec. 652), *supra*, p. 10 provides specifically that such an employee may be removed only "for such cause as will promote the efficiency of said service."

Petitioner concedes that this question of what promotes the efficiency of the service is one of discretion and must be entrusted to the determination of the responsible administrative official. Under ordinary circumstances, i.e.,

when exercised properly, the determination thereof is not reviewable by the courts.

Keim v. *United States*, 177 U. S. 290;
Erberlein v. *United States*, 257 U. S. 82;
Perkins v. *Lukens Steel Co.*, 310 U. S. 113.
Peck v. *United States*, 114 Ct. Cl. 551.

However, it is an equally well-known and applicable rule of law that this Court has never hesitated to assert its authority to curb abuses and set aside administrative decisions where there has been an arbitrary exercise of this discretionary power.

Burchell v. *Marsh*, 17 How. 344, 349;
Kihlberg v. *United States*, 97 U. S. 398;
United States v. *Gleason*, 175 U. S. 558, 602;
Ripley v. *United States*, 223 U. S. 695, 701.

The United States Court of Claims itself has made a strong acknowledgment of this judicial limitation upon the power of dismissal by departmental authorities in clear and unmistakable language in *Gadsden* v. *United States*, 111 Ct. Cl. 487. There it was held that whenever it can be clearly established that the dismissal was prompted by malice, caprice, or other arbitrary motives, the protective cloak of immunity from judicial interference is torn away from the administrative action, even though the statutory procedure for removal were religiously followed.

The existence or non-existence of arbitrariness is difficult to establish. Unlike most evil intentions, it is not always apparent from the result accomplished. In the case of a dismissal of an employee for an alleged criminal offense, the subsequent acquittal of the employee on a criminal prosecution for the same offense does not necessarily demonstrate that the employer acted without justification. An outstanding authority to this effect is *Croghan* v. *United States*, 116 Ct. Cl. 577, 89 F. Supp. 1002, cert.

den. 340 U. S. 854. See also, *Dupre* v. *United States,* 116 Ct. Cl. 660; *Ginn* v. *United States,* 110 Ct. Cl. 637. In each of these the courts held, properly, that neither a subsequent conviction nor acquittal is proof that the prior dismissal was either justified or arbitrary.

But the present case is easily distinguishable from those cited. In each of them the plaintiffs relied upon the mere fact of acquittal as proof of an abuse of the discretionary power. Here, the reliance is not upon the acquittal itself, but upon the evidence adduced at the trial, upon which the acquittal was founded, to clearly demonstrate that the motives which permeated the administrative charges and resulted in the administrative decision for removal were malicious and, hence, the latter was arbitrary. Even disregarding any consideration of that portion of the evidence which the court below excluded from the record, the conclusion is inescapable that the separation here was made, not as a result of any determination as to the truth or falsity of the charges, but because of a predetermination that petitioner must be discharged at all costs. The recommendations for the dismissal, (Def. Ex. 2 and 3), standing alone, in the light of all the circumstances, are sufficient for this purpose. Inspector Urban who made these recommendations, was the same inspector who had been a party to the conspiracy from its inception—several weeks before October 15, 1946, the date of the alleged offenses. It was he who had been secretly approached by the "informers", over the head of their immediate superiors, with their mysterious "notes" as to defalcations by petitioner; it was he who had unsuccessfully tried to establish proof of these earlier allegations; and it was he who set the so-called trap on October 15, and only he who can positively tell what happened on that day. And it is he who, with full knowledge that the charges of misconduct had been

filed against petitioner only on October 17, and that petitioner would

> "* * * be allowed five (5) days from the receipt of this letter for answering in writing. Any facts on the circumstances not previously furnished us by you may be included in your reply in support of which you may attach such affidavits as you may care to submit relating to the charges. If, on receipt of your reply, it appears that further investigation is warranted, such action will be taken. If additional time is needed, it will be granted upon written application to us showing the necessity." (R. 12)

nevertheless, on October 19, only two days after the above was written, and three days before the answer was even due, unhesitatingly recommended the dismissal, which was later granted. Obviously no investigation was or could have been made in that time. And the letters themselves indicate that none had been made before, for the recommendations are based upon the uncorroborated statements of the informers and the two women employees who submitted the parcels for mailing but were so confused that they could not even identify the change they allege they received from petitioner. The inference is self-speaking. The decision to get rid of petitioner had been arrived at long before that date and the recommendation and actual dismissal were mere "props" in an elaborate stage-setting for the performance of a farce.

If the excluded testimony, hereinafter discussed in Argument III, had been admitted, it should have clearly convinced the Court of Claims that such a conspiracy existed and that it was this conspiracy that caused the dismissal, and not an honest, independent, administrative decision as to what the efficiency of the service required under the circumstances.

It is on this theory that petitioner contends that the fact

of acquittal becomes material and should have been weighed by the Court of Claims in determining whether the order of dismissal was a act of sound discretion or an abuse thereof. For the acquittal was based upon evidence which conclusively established not only petitioner's innocence but also the existence of a preconceived plot which had, as its ultimate end-result the very action by the respondent here complained of.

II

THERE WAS NO SUBSTANTIAL OR REAL COMPLIANCE WITH THE STATUTORY REQUIREMENTS REGULATING DISMISSAL OF CIVIL SERVICE EMPLOYEES AND THE RESPONDENT IS LIABLE FOR THIS REASON.

The statute governing dismissals (Section 6 of the Act of August 24, 1912 (Tit. 5, U. S. C., Sec. 652)), *supra*, p. 8, provides, so far as material for this discussion, that the person whose removal is sought

> "* * * shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, *and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof;* but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal * * *" (Italics supplied).

It is a well-established rule in this type of cases that the agency seeking to dismiss an employee must comply strictly with the procedural regulations as to the manner of the dismissal. They are treated as mandatory, and any deviation from them avoids the dismissal. *United States* v. *Perkins*, 116 U. S. 463; *United States* v. *Wickersham*, 201 U. S. 390; *Wittner* v. *United States*, 110 Ct. Cl. 231.

While there is no contention in the case at bar that petitioner was not given written notice of the charges, nor *offered* a reasonable time within which to answer them in

writing, nor does he contend that he was entitled either to an examination of witnesses nor a formal hearing, it is submitted that it is mandatory that, under the language of the statute, there must be a real, not a feigned, investigation or weighing of the facts presented by these charges and answer, and a deliberative judgment formed thereon. Otherwise the requirement of written charges and opportunity to answer are meaningless.

> "If the procedure provisions are not mandatory, they are largely meaningless. The officials could act as if such provisions were never part of the law. They could apply or not apply them to suit their whim, just as they do, or do not take their morning calisthenics, depending on whether they feel like it. We cannot believe Congress had any such idea in mind."
>
> *Wiltner* v. *United States, supra.*

And the phrase of the statute cited "except for such cause as will promote the efficiency of such service" becomes absolutely useless. If a mere compliance with the technical requirements of submission of the charges in writing and affording an opportunity to answer suffice to preclude the courts from inquiry into the question of good faith in the act of dismissal then it must be concluded that Congress enacted meaningless legislation. To hold this is to leave the hapless government employee without any protection against abuse of discretionary power by his superior officer. This is unthinkable. It must be assumed that Congress intended an effective protection. And in order to afford any measure of assurance of continuity of employment against wilful or malicious discharges, the act must be interpreted as implying a requirement of an honest investigation of all the facts submitted, both by the accuser and the accused, before a decision is arrived at and a separation recommended and achieved. If this be not

true, then the halycon days of the "Star Chamber" have returned to departmental administrators under a new title of "Administrative Discretion".

That this "mandatory" procedure was not followed in petitioner's case is self-evident. The recommendation for dismissal was made by the responsible official three days before the time fixed for the answer even to be filed had expired. Where was the opportunity for weighing the defense against the accusation? What profited it the petitioner to make an answer?

The situation here presented is even more flagrant than that appearing in *Elchibegoff* v. *United States*, 106 Ct. Cl. 541, where the Court severely criticized the administrative procedure because the recommendation and decision for dismissal were *apparently* reached before the answer to the charges were filed, and certainly before it could have been considered. Here the vice is greater, for the respondent's own testimony establishes that the recommendation was not *apparently*, but *actually*, made two days after the filing of the charges and three days before the time fixed for the filing of the answer had expired. And then, to pile Ossa upon Pelion, the respondent blatantly admits that petitioner's dismissal was predicated solely upon this recommendation, which, in turn, was based solely upon hearsay (Tr. 26). A greater perversion of legislative intent is difficult to imagine.

The invasion of the administrative division of our government upon the judicial department in the past several years has given grave alarm. No comment or criticism thereof is here offered or intended. But if it now be held, as was contended below by respondent, that this Court is without the power to interpret the legislative act here in question, so as to read into it the obvious intent of a quasi-judicial determination, upon the facts presented by

the charges and the answer, conscientiously arrived at after a careful consideration of both, then it must be humbly and deferentially submitted that our judiciary has abandoned its traditional equal place under our tri partite system of government, and admits its subjugation to the vagaries of legislative language and the literal application thereof by the administrative agencies.

III

THE COURT OF CLAIMS COMMITTED REVERSIBLE ERROR IN REFUSING TO ADMIT INTO EVIDENCE HEREIN THE TRANSCRIPT OF THE TESTIMONY TAKEN IN THE CRIMINAL PROSECUTION OF THE PETITIONER UPON THE SAME CHARGES WHICH FORMED THE BASIS OF HIS DISMISSAL FROM FEDERAL EMPLOYMENT.

Petitioner strenuously objected below, and, with equal confidence, asserts here, that the Court of Claims could not, objectively, determine the question of whether or not respondent had acted arbitrarily in the dismissal of petitioner without a full knowledge of all the facts which led up to the preferment of charges, the recommendation for dismissal and the actual severance from the service (R. 8, 9). It was argued by him that these were circumstantial evidentiary facts which shed light upon the motives of the respondent and that the court, in its discretion, should accept them for such probative value as they might bear. Liberality in admission of such evidence, under these conditions (e.g., as here, where proof of arbitrary action must depend upon related facts) is to be exercised. *Northwestern Mut. Life Ins. Co. v. Johnson*, 275 F. 757. Our legal history and literature is replete with citations which support the proposition that collateral acts and declarations may always be shown to establish a present motive. Whenever the intent or guilty knowledge of a party is material in the issue of a case, collateral facts intending

to show such intent or knowledge, are proper evidence. *Bottomeley* v. *United States*, Fed. Cas. No. 1,688, 1 Story 135. The principles announced in these early cases are fundamental. They have been followed, without any variation, throughout the years except as to their application to the circumstances under consideration. To labor the pages of this brief with all the cases which follow these precedents would be a useless waste of space and a burden upon the patience of the Court.

Assuming the postulate that a trial court is always at liberty to receive evidence of other acts and doings of a kindred nature of the party accused, in order to illustrate or establish his interest or motive in the particular act directly in judgment (*Wood* v. *United States*, 41 U. S. 342), it follows that the Court of Claims below should have received the evidence offered by petitioner which would have conclusively established the existence of a conspiracy between employees and agents of the respondent to accomplish the removal of petitioner from his position at the Shaker Square Station of the Cleveland Post Office.

Petitioner's offer of the testimony adduced at the criminal proceedings, (United States v. Joseph Bryant, Jr., Cr. Case No. 19072, United States District Court for the Northern Division of Ohio, Eastern District) was unqualifiedly rejected by the court below (Tr. 32). Petitioner here says that the transcript of that testimony, if accepted, would have shown that the two principal informers, Vilies and Sznell, having developed a racial antagonism towards petitioner, agreed among themselves and other employees of respondent, who are unknown to your petitioner, to fabricate charges of irregularities in the handling of postal funds by petitioner in order that he might be relieved of his duties as a window clerk at the sub station; that this conspiracy was further motivated by the desire of

one of the conspirators, who was acting as a temporary clerk only, to have the permanent assignment of petitioner; that pursuant to this design they contacted Inspector Urban, without first reporting to either the Superintendent of their sub-station or the Postmaster of the City of Cleveland; that Urban agreed to act with them; that these informers claimed to have written memoranda of acts of defalcation by petitioner; that all of these acts by the informers and the inspector occurred prior to September 1, 1946; that the alleged knowledge of the informers as to petitioner's wrongful acts had been known to them for more than two weeks before they communicated them to the inspector; that the inspector then made at least more than one attempt to establish the proof of the charges but was unsuccessful; that on the critical date, October 15, the two women employees of respondent, incidentally chosen by Inspector Urban, were furnished with parcels for mailing which had previously been weighed, but the weights and postage for which were not communicated to the ladies, and likewise supplied with a ten and five dollar bill respectively, neither of which was marked for identification later, and told to present them at petitioner's window only; that they did so and received indiscriminate change in return for the postage paid, which change they could not subsequently identify, since they immediately turned it over to Inspector Urban, although one of the women admitted that she had substituted some change of her own; that they subsequently swore, under oath, that they had been overcharged for the postage, despite the fact that the parcels, upon immediate seizure after receipt by petitioner bore correct postage stamps; that there was no evidence of any such bills of the denomination presented by the women proved to have been in petitioner's cash box which was immediately impounded by Inspector Urban; that petitioner was imme-

diately searched as to his person and no such bills nor any other money (including the alleged 72¢) could be found upon him; that the voluminous notes which the informers Vilies and Sznell had made as to their observations of petitioner's peccadillos with the government cash which prompted them to report to Inspector Urban in the first place had been *deliberately* destroyed by them between the date of arrest and trial because they believed they were no longer needed; and, finally, although this does not exhaust the list of manifest falsehoods and discrepancies, Inspector Urban's recommendation, made four days after the arrest, two days after his formal written accusation and three days before an answer thereto could be given, was unqualified that the petitioner should be dismissed from the service. *Any comment is superfluous, and an insult to the intelligence of this Court.*

The rules of admission of evidence are clear. The duty of a trial court is clear. It has no alternative to the acceptance of otherwise competent and admissible evidence if such evidence will aid it in the resolution of a controversy. It is not believed that a certified transcript of the testimony taken before a federal court in a matter which grows out of the same facts, where such evidence may throw light upon the motives of the parties in the action before it for determination is either incompetent or irrelevant. While it may be collateral, it does not prejudice the respondent, since the previous issues are forever closed, and rights established thereby are permanently fixed and the rules as to hearsay are not applicable. The issue before the Court is not that of whether or not petitioner committed the acts of which he was accused, either by the postoffice department of the government or its criminal justice division. If that were the case, different rules as to admissibility would apply. But where the question involved is as to the

existence or non existence of a bias or prejudice, whether personal, racial, religious, or arbitrary and without reason, then the courts are not bound by the limitations of the "hearsay" rule, and may examine former testimony of the parties to enable a determination of the question of the motives of the actor.

Conclusion

Petitioner, while he is not authorized and does not pretend to act for the hundreds of thousands of his fellow employees who may be similarly affected, has attempted to set forth herein a cause of complaint which he feels is common to them. In his own right he asserts that he has been grieviously damaged by the administrative rulings of the Post Office Department of the United States, the respondent herein, and by the decision of the United States Court of Claims denying him relief. He earnestly feels that it is incumbent upon this Court to clarify the rules and regulations governing the separation of civil service employees from their positions on "framed" issues. The applicable statute has been too narrowly construed. Saving a reasonable interpretation thereof by this Court, petitioner, and all others like him, is left at the mercy of his superior officers who may act without limit as their "discretion", and there is no remedy except the vague hope of a legislative amendment.

For the reasons heretofore set forth, petitioner respectfully prays that this Honorable Court will grant the writ of certiorari herein requested, and upon review, reverse the judgment and order hereinbefore entered, and for such other relief as may be just and proper in the premises.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 434

JOSEPH P. BRYANT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 13-16) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1952 (R. 16). The time for filing a petition for a writ of certiorari was extended to November 1, 1952 (R. 16-17). The petition was filed on November 1, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether a civil service employee, separated in compliance with Sec. 6 of the Act of August 24, 1912, 5 U.S.C. 652, *infra,* is entitled to compensation for the period of separation where a criminal prosecution based upon charges leading to his separation results in his acquittal and he is ultimately reinstated in the postal service.

STATUTE INVOLVED

Section 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555, 5 U.S.C. 652, provides in pertinent part as follows: [1]

> That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, * * *.

[1] The applicable regulation of the Civil Service Commission follows the form and substance of the statute and is found at 5 C.F.R., 1946 Supp., 27.12.

STATEMENT

Petitioner, Joseph P. Bryant, Jr., a classified civil service employee, commenced this action in the Court of Claims to recover damages in the form of unpaid salary covering a period of suspension and removal from his employment as a postal clerk at a Post Office sub-station in Cleveland, Ohio; in addition, he sought redress for the alleged "deprivation of the opportunity to be advanced in the Postal Service of the United States to a position of trust." (R. 1) The complaint alleged that his suspension and removal from his job were wrongful and the result of a conspiracy between his co-workers and a postal inspector to procure his discharge. He contends that the charges leading to his dismissal were the result of false and malicious statements by his co-workers, and that the failure of responsible officials to conduct an adequate investigation of the charges renders the action in discharging him arbitrary and an abuse of their discretionary powers. The Court of Claims found that petitioner's dismissal was accomplished in compliance with the procedural requirements of 5 U.S.C. 652, *supra*, p. 2, and that the charge of arbitrary action and abuse of discretion was not sustained by the facts of the record (R. 15).

Petitioner first entered the Postal Service in 1927 (Fdg. 1, R. 10). On October 15, 1946, while on duty as a "window clerk" at a Cleveland substation, he was contacted by postal inspectors and by them charged with demanding and receiving,

on October 15, 1946, a rate of postage in excess of the rate provided by law, on two parcels presented for mailing (Fdg. 2, R. 10) by persons acting at the instance of postal inspectors. Petitioner denied that he had deliberately charged more than the authorized rate and stated that he had no explanation to offer for the discrepancies in the amounts charged and the value of the stamps actually placed on the parcels. He was suspended from further duty on that date (Fdg. 2, R. 10).

On October 17, 1946, the postal inspectors served petitioner with written charges detailing the alleged over-charges and stating that the petitioner was allowed five days in which to answer the charges in writing and submit affidavits relating to his answer. On October 22, 1946, petitioner formally denied the charges under oath (Fdg. 3, R. 10-11).

On the same date that petitioner was notified of the charges, a warrant for his arrest was issued; bond was furnished and a hearing fixed for October 25. The hearing was held as scheduled; on November 20 an information was filed and, based upon the excessive charges of October 15, petitioner was charged in two counts with violation of 18 U.S.C. Section 330 (Fdg. 4, R. 2, 11-12). Petitioner was tried on April 14 and 15, 1947, on these charges and was acquitted (Fdg. 4, 5, R. 11-12).

On November 12, 1946, the First Assistant Postmaster General had advised the Postmaster at

Cleveland that after consideration of the evidence submitted it had been decided that petitioner should no longer be retained in the Postal Service and directed that petitioner's dismissal be effected. The separation was accomplished on November 15, 1946 (Fdg. 5, R. 12). Following his acquittal of the criminal charge, petitioner, on May 1, 1947, wrote the Cleveland Postmaster and requested restoration in the Postal Service. The letter was transmitted to the First Assistant Postmaster General who then advised petitioner on May 19, 1947, that: "In view of the nature of the charges which resulted in your separation from the service, it is deemed inadvisable to take any action looking to your reinstatement to a position in the postal service." (Fdg. 6, R. 12).

Subsequently, on September 26, 1947, the First Assistant Postmaster General advised the Cleveland Postmaster that after further consideration of petitioner's case it was felt that he had been sufficiently punished. He requested that certain personnel forms and a fingerprint chart be submitted for further transmittal to the Civil Service Commission with a view toward petitioner's reinstatement, subject, however, to the proviso that if and when reinstatement were authorized petitioner was not to be given an assignment where he would handle financial transactions at any time (Fdg. 7, R. 12). This action resulted in petitioner's reinstatement in the Postal Service at Cleveland on January 3, 1948. He is presently assigned as an

employee in the Los Angeles Post Office; in that assignment he has been on "window duty" and has handled Government funds (Fdg. 7, R. 12-13).

ARGUMENT

Petitioner was given written notice of the charges against him, and a reasonable time in which to answer the charges in writing and to submit affidavits in support of his answer. He availed himself of his statutory rights, and his separation was directed only after deliberative consideration of the charges and evidence against him by competent administrative authority. Manifestly, the separation was accomplished in full compliance with the procedural requisites of Section 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555, 5 U.S.C. 652, *supra*, pp. 2-3, applicable to removals of classified civil service employees.[2] At this point judicial review ceases, for the only possible remaining inquiry is whether the removal was "for such cause as will promote the efficiency of the service" (5 U.S.C. 652, *supra*, p. 2). It has long been settled that courts will not interfere, even with the advantage of hindsight, with an administrative determination as to the existence of cause for removal, involving matters of judgment and discretion, unless it palpably appears that the action was so arbitrary or capricious as to compel

[2] Subsequent to petitioner's removal and reinstatement, 5 U.S.C. 652 was amended by the Act of June 10, 1948, c. 447, 62 Stat. 354, to provide payment of compensation covering periods of separation to civil service employees who have been reinstated on the ground that their removal or suspension was unjustified or unwarranted.

an inference that the removal was prompted by malice. The cases supporting this principle are legion: *Decatur* v. *Paulding*, 14 Pet. 497; *Keim* v. *United States*, 177 U.S. 290; *Eberlein* v. *United States*, 257 U.S. 82; *White* v. *Berry*, 171 U.S. 366; *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A.D.C.); *Siskind* v. *Morgenthau*, 152 F. 2d 286 (C.A.D.C.); *Hammond* v. *Hull*, 131 F. 2d 23 (C.A.D.C.), certiorari denied, 318 U.S. 777; *Love* v. *United States*, 108 F. 2d 43 (C.A. 8), certiorari denied, 309 U.S. 673; *Levine* v. *Farley*, 107 F. 2d 186 (C.A.D.C.), certiorari denied, 308 U.S. 622. The Court of Claims found that petitioner's allegation of arbitrary and capricious action motivated by malice was not sustained, and the record is devoid of evidence supporting the charge. Accordingly, the principle above referred to and the cited decisions are dispositive of the case.

Even if the determination of the administrative authority as to the existence of cause were open to judicial review, the evidence fully justified the conclusion reached. The petitioner, at the time of his original suspension, occupied a position of trust in the postal service requiring unimpeachable honesty and integrity. On two occasions on the same day he allegedly charged excessive rates on parcels presented for mailing. He offered no explanation for the discrepancies. That such action rendered his conduct suspect is hardly open to serious doubt. His suspension and subsequent separation, based upon these charges, were fully justified and, even in retrospect, clearly preclude

any inference that the responsible officials acted arbitrarily or capriciously.

The petitioner's subsequent acquittal of the criminal charges based upon the same incidents which resulted in his dismissal in no way militates against this conclusion. The considerations involved in a criminal prosecution and those involved in an administrative determination as to the fitness of an employee for retention in the government service are necessarily dissimilar. In a criminal prosecution the burden of proving the guilt of the accused beyond a reasonable doubt is much more stringent than in a civil suit or an administrative determination of an employee's fitness (*United States* v. *Real Estate Boards*, 339 U.S. 485, 493; *Helvering* v. *Mitchell*, 303 U.S. 391, 397); an acquittal is "merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis* v. *Frick*, 233 U.S. 291, 302. Neither the subsequent adjudication of the employee's innocence of criminal charges, nor his subsequent reinstatement, operated retroactively to invalidate the removing authority's prior determination that at the time and in the circumstances such cause existed as warranted separation. *Eberlein* v. *United States*, 257 U.S. 82.[3]

It is sheer cavil to suggest (R. 3) that the pre-

[3] For similar reasons, the Court of Claims did not err in excluding the proffered Transcript of Testimony of the criminal proceeding. That testimony, given subsequent to petitioner's dismissal, could not establish that, on the evidence available at the time of dismissal, such action was unwarranted.

sumption of innocence attending criminal accusations required that petitioner be retained in his position until such time as a jury passed upon his innocence or guilt of the charges. So to circumscribe the otherwise discretionary power of administrative officials to pass upon the fitness of employees would be to reduce their authority to impotency and result in an unwarranted peril to the public interest.

The somewhat nebulous assertion that petitioner is entitled to damages "by way of deprivation of the opportunity to be advanced in the Postal Service of the United States to a position of trust" (R. 1) is equally without merit. It is apparently predicated upon the condition, attached to petitioner's reinstatement (Fdg. 7, R. 12), that he not be given an assignment where he would handle financial transactions at any time. Not only did the Court of Claims find that petitioner, since his reinstatement, has been on "window duty" and "has worked money orders" (Fdg. 7, R. 12-13), but such a proposition can only rest upon the asserted illegality of the original suspension and separation. Since, as has been pointed out, petitioner's removal was in compliance with law, there was no obligation to restore him to service. An election to do so, being an exercise of discretion, may be accompanied by such reasonable conditions as those authorizing the restoration see fit to impose. *Friedman* v. *Schwellenbach*, 159 F. 2d 22, 24 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER, 1952.

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